

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Crystal Diner, Inc. :  
for Redetermination of a Deficiency or for Refund :  
of Corporation Franchise Tax under Article 9-A of :  
the Tax Law for the Fiscal Years Ended May 31, :  
1979 through May 31, 1981. :  
: AFFIDAVIT OF MAILING

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In the Matter of the Petition :  
of :  
LBMS Restaurant, Inc. :  
for Redetermination of a Deficiency or for Refund :  
of Corporation Franchise Tax under Article 9-A of :  
the Tax Law for the Fiscal Years Ended December 31, :  
1978 through December 31, 1981. :

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State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of August, 1985, he served the within notice of Decision by certified mail upon Crystal Diner, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Crystal Diner, Inc.  
3496 Long Beach Rd.  
Oceanside, NY 11572

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Page 2

Affidavit of Mailing

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
21st day of August, 1985.

David Parchuck

Ann M. O'Haguel  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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the Tax Law for the Fiscal Years Ended May 31, :  
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In the Matter of the Petition :  
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the Tax Law for the Fiscal Years Ended December 31, :  
1978 through December 31, 1981. :

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State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of August, 1985, he served the within notice of Decision by certified mail upon Jack M. Portney, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack M. Portney  
207 Main St., P.O. 346  
Fort Lee, NJ 07024

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Page 2

Affidavit of Mailing

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
21st day of August, 1985.

David Perchuck

James A. Haglund

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

August 21, 1985

Crystal Diner, Inc.  
3496 Long Beach Rd.  
Oceanside, NY 11572

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Jack M. Portney  
207 Main St., P.O. 346  
Fort Lee, NJ 07024  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Crystal Diner, Inc. :  
for Redetermination of a Deficiency or for Refund :  
of Corporation Franchise Tax under Article 9-A of :  
the Tax Law for the Fiscal Years Ended May 31, :  
1979 through May 31, 1981. :  
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In the Matter of the Petition :  
of :  
LBMS Restaurant, Inc. :  
for Redetermination of a Deficiency or for Refund :  
of Corporation Franchise Tax under Article 9-A of :  
the Tax Law for the Fiscal Years Ended December 31, :  
1978 through December 31, 1981. :

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State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of August, 1985, he served the within notice of Decision by certified mail upon LBMS Restaurant, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

LBMS Restaurant, Inc.  
3496 Long Beach Road  
Oceanside, NY 11572

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Page 2

Affidavit of Mailing

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
21st day of August, 1985.

David Barcluck

Barney A. Haylund  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

August 21, 1985

LBMS Restaurant, Inc.  
3496 Long Beach Road  
Oceanside, NY 11572

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Jack M. Portney  
207 Main Street, P.O. Box 346  
Fort Lee, NJ 07024  
Taxing Bureau's Representative



STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
CRYSTAL DINER, INC.  
for Redetermination of a Deficiency or for  
Refund of Corporation Franchise Tax under  
Article 9-A of the Tax Law for the Fiscal Years  
Ended May 31, 1979 through May 31, 1981

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DECISION

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In the Matter of the Petition  
of  
LBMS RESTAURANT, INC.  
for Redetermination of a Deficiency or for  
Refund of Corporation Franchise Tax under  
Article 9-A of the Tax Law for the Fiscal Years  
Ended December 31, 1978 through December 31,  
1981.

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Petitioner, Crystal Diner, Inc., 3496 Long Beach Road, Oceanside, New York 11572, filed petitions for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended May 31, 1978 through May 31, 1981 (File No. 44276).

Petitioner, LBMS Restaurant, Inc., 3496 Long Beach Road, Oceanside, New York 11572, filed petitions for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended December 31, 1978 through December 31, 1981 (File No. 44279).

A consolidated hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 8, 1985 at 1:15 P.M. Petitioners appeared by Jack M. Portney,

C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether the Audit Division properly used the results of a sales tax audit to adjust petitioner's corporation franchise taxes without performing an independent audit.

FINDINGS OF FACT

1. On March 25, 1983, the Audit Division issued three notices of deficiency pursuant to Article 9-A of the Tax Law against petitioner Crystal Diner, Inc. ("Crystal") as follows:

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Additional Charge</u>	<u>Total Due</u>
5/31/79	\$ 120.00	\$ 52.89	\$ 6.00	\$ 178.89
5/31/80	\$4,425.80	\$1,574.12	\$221.29	\$6,221.21
5/31/81	\$ 548.55	\$ 148.09	\$ 27.41	\$ 724.05

2. On March 25, 1983, the Audit Division issued four notices of deficiency pursuant to Article 9-A of the Tax Law against petitioner LBMS Restaurant, Inc. ("LBMS") as follows:

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Additional Charge</u>	<u>Total Due</u>
12/31/78	\$ 288.38	\$ 137.36	\$ 14.42	\$ 440.16
12/31/79	\$5,847.00	\$2,287.93	\$292.35	\$8,427.28
12/31/80	\$3,601.80	\$1,103.23	\$180.09	\$4,885.12
12/31/81	\$ 784.47	\$ 134.33	\$ 39.22	\$ 958.02

3. Petitioners are corporations, each of which operates a diner and have the same officers. The diners serve food and beverages, including alcoholic beverages. Sales tax audits were commenced at each diner and in each case the auditor determined that petitioners failed to maintain adequate books and records and that complete audits could not be conducted. Neither diner retained any guest checks or register tapes. The auditor performed markup tests on food purchases and beverage purchases for each diner to determine total taxable

sales for the audit periods. The auditor also determined additional minimal amounts of sales tax due based on other tests performed. Petitioners agreed to the results of the sales tax audits.

4. Subsequently, the sales tax audit results were used to adjust petitioners' corporation franchise taxes due. The additional sales found for sales tax purposes were applied as additional gross receipts or sales for corporation franchise tax purposes and the respective tax for each petitioner was increased by an appropriate amount.

5. Petitioners do not object to the sales tax audit findings but to the use of the sales tax audit findings for corporation franchise tax audit purposes. Petitioners' primary objection is that such sales tax audits are irrelevant to corporation franchise tax because the sales tax is a transactional tax, while the franchise tax is derived from income, less exemptions and deductions. However, petitioners offered no evidence that they had additional cost of goods sold or other deductions that would partially offset the additional sales found on audit.

#### CONCLUSIONS OF LAW

A. That where there is some factual basis for deciding that the tax returns as filed do not accurately reflect the true income received by a taxpayer, the Audit Division may determine proper income using indirect methods. See Holland v. United States, 348 U.S. 121, 131-132. The sales tax audits conducted by the Audit Division revealed additional sales tax due from each petitioner. Such determinations provided a factual basis for deciding that the income reported by petitioners on their corporation franchise tax reports was not accurate and, thus, the Audit Division properly used the sales tax audit findings to calculate corporation franchise tax. Nowhere in the Tax Law or regulations is the Audit Division precluded from utilizing the results of an

audit conducted under one article of the tax law in an audit conducted under another article. See Matter of Castaldo, State Tax Commission, February 15, 1985. Moreover, petitioners have not met their burden of proof under section 1089(e) of the Tax Law to show that there were additional costs or expenses associated with the additional sales, nor was any other evidence produced indicating that the audit was inaccurate.

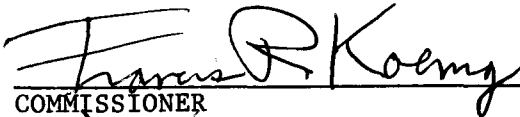
B. That the petitions of Crystal Diner, Inc. and LBMS Restaurant, Inc. are denied and the notices of deficiency issued March 25, 1983 are sustained.

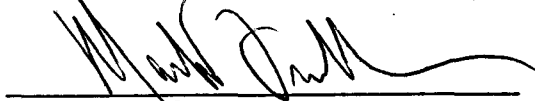
DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER